FILED
DEC 8 1952

# In The
# Supreme Court of the United States

**OCTOBER TERM, 1952**

## No. 491

HOXSEY CANCER CLINIC, a partnership, and
HARRY M. HOXSEY, an individual,
*Petitioners,*
VERSUS
UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF**

HERBERT K. HYDE,
706 Cravens Building,
Oklahoma City, Oklahoma;

ROY ST. LEWIS,
National Press Building,
Washington, D. C.,
*Attorneys for Petitioners.*

LEE WILLIAMS,
706 Cravens Building,
Oklahoma City, Oklahoma,
*On the Brief.*

DECEMBER, 1952.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE FO 5-2969

# INDEX


| | PAGE |
|---|---|
| Petition for Writ of Certiorari | 1-7 |
| A. Summary statement of the matter involved | 2 |
| B. Basis of jurisdiction of this Court | 3 |
| C. Questions presented | 3 |
| D. Reasons relied on for the allowance of the Writ | 4 |
| Prayer for Writ | 6 |
| Brief in Support of Petition for Writ of Certiorari | 9-31 |
| I. Opinions | 9 |
| Authority:— | |
| 94 F. Supp. 464 | 9 |
| 198 F. 2d 273 | 10 |
| II. Jurisdiction | 10 |
| Authority:— | |
| Title 28, Section 1254 (1), U.S.C.A., 62 Stat. 928 | 10 |
| III. Statement of the Case | 10 |
| Authority:— | |
| Sanders v. Leech (C.A. 5), 158 F. 2d 486 | 14 |
| United States v. Gypsum Co., 333 U.S. 364, 395 | 14 |
| 21 U.S.C. 301, et seq. | 10 |
| IV. Specifications of Error, and Summary of Argument | 15 |

PAGE

A. ..... 15

Authority:—

American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 S. Ct. 33, 47 L. ed. 90 ..... 24

Arnstein v. Porter (C.A. 2), 154 F. 2d 464 ..... 23

Coleman v. U. S. (C.A., D.C.), 176 F. 2d 469 ..... 23

Colusa Remedy Co. v. U. S. (C.A. 8), 176 F. 2d 554 ..... 24

Federal Savings & Loan Ins. Corp. v. First National Bank (C.A. 8), 164 F. 2d 929 ..... 23

Fox River Paper Corp. v. U. S. (C.A. 7), 165 F. 2d 639 ..... 23

Gipps Brewing Corp. v. Central Mfgrs. Ins. Co. (C.A. 7), 147 F. 2d 6 ..... 23

Hidspeth v. Esso Standard Oil Co. (C.A. 8), 170 F. 2d 418 ..... 23

National Labor Relations Board v. Pittsburg S. S. Co., 337 U.S. 656, 69 S. Ct. 1283, 93 L. ed. 1602 ..... 21

Orvis v. Higgins (C.A. 2), 180 F. 2d 537 ..... 26

Sanders v. Leech (C.A. 5), 158 F. 2d 486 ..... 20

Soy Food Mills v. Pillsbury Mills (C.A. 7), 161 F. 2d 22 ..... 22

United States v. Gypsum Co., 333 U.S. 364, 395, 92 L. ed. 746, 68 S. Ct. 525 ..... 20

United States v. Dr. David Roberts Vet. Co. (C.A. 7), 104 F. 2d 785 ..... 25

United States v. Kaadt (C.A. 7), 171 F. 2d 600 ..... 25

United States v. Six Dozen-Dr. Peter's Juriko (C.A. 7), 158 F. 2d 667 ..... 25

United States v. Yellow Cab Co., 338 U.S. 338, 70 S. Ct. 177, 94 L. ed. 105 ..... 21

Bouvier, Definition of "Clear" ..... 27

PAGE

Federal Rules of Civil Procedure, Rule 52(a) 15
Webster, Definition of "Clearly" 27

B. 29

Authority:—

McDermott v. Wisconsin, 228 U.S. 115, 33 S. Ct. 431, 57 L. ed. 754 29
Preamble to the United States Constitution 29
Article 1, Section 8, Constitution 29
Fifth Amendment, Constitution 29
Tenth Amendment, Constitution 29

Conclusion 30

# In The
# Supreme Court of the United States
**OCTOBER TERM, 1952**

---

## No.

---

HOXSEY CANCER CLINIC, a partnership, and
HARRY M. HOXSEY, an individual,
*Petitioners,*

VERSUS

UNITED STATES OF AMERICA,
*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF**

---

### PETITION FOR A WRIT OF CERTIORARI

May It Please the Court:

The Petition of Hoxsey Cancer Clinic, a partnership, and Harry M. Hoxsey, an individual, respectfully shows to this Honorable Court:

## A.

### Summary Statement of the Matter Involved

The United States of America filed this action in the United States District Court for the Northern District of Texas under the provisions of the Federal Food. Drug and Cosmetic Act (21 U.S.C. 301, *et seq.)*, seeking injunctive relief to prevent petitioners from introducing into interstate commerce certain medicines intended for use in the treatment and cure of cancer. The Complaint (R. 3) alleges specifically that the drugs, which are distributed and dispatched to physicians, practitioners, and other persons, by petitioners, are misbranded, because their labeling, specifically a booklet accompanying them, contains "general and specific statements which represent and suggest that said drugs are efficacious in the treatment, mitigation and cure of cancer in man, which statements are false and misleading since said drugs are not efficacious in the treatment, mitigation and cure of cancer in man."

After an extended trial before the Honorable William H. Atwell, United States District Judge, the trial court made Findings of Fact and Conclusions of Law (R. 1140, *et seq.)* and based thereon entered judgment (R. 1149) on December 14, 1950, denying the injunction prayed for. Judge Atwell's opinion is reported in 94 F. Supp. 464.

The Government appealed from said decision to the United States Court of Appeals for the Fifth Circuit, and

that court on July 31, 1952, entered judgment (R. 1173), reversing the judgment of the District Court and ordered said cause remanded with direction that the trial court order an injunction to issue as prayed. The opinion of the Court of Appeals written by Russell, C. J., appears in the record (R. 1157) and is reported in 198 F. 2d 273.

Petition for Rehearing (R. 1174) was duly filed, and the same was overruled on September 10, 1952 (R. 1194).

---

**B.**

**Basis of Jurisdiction of This Court**

Jurisdiction of this Court to review said decision by writ of certiorari is given by U.S.C., Title 28, Section 1254(1), 62 Stat. 928, and this Petition is filed within the period of ninety days provided by U.S.C., Title 28, Section 2101(c).

---

**C.**

**Questions Presented**

Whether the Court of Appeals, under Rule 52(a) of the Federal Rules of Civil Procedure, may entirely disregard Findings of Fact of the trial court in an action tried upon the facts without a jury, and proceed to weigh the evidence and pass upon the credibility of the witnesses and set aside the trial court's judgment solely by

resolving a conflict of medical opinion between two separate schools of thought as to the proper and best methods of treatment of patients for disease?

---

**D.**

**Reasons Relied on for the Allowance of the Writ**

1. The decision of the Court of Appeals is probably in conflict with applicable decisions of this Court, particularly *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. ed. 746, holding that oral testimony elicited by leading questions would be given little weight on appeal where such testimony *directly conflicted with documentary evidence;* and with *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, 94 L. ed. 105, holding that a choice by the trier of facts between two permissible views of the *weight* of evidence is not *"clearly erroneous"*; and with *National Labor Relations Board* v. *Pittsburg S. S. Co.*, 337 U.S. 656, 69 S. Ct. 1283, 93 L. ed. 1602, holding that Rule 52 applies to appeals by the Government as well as to those by other litigants, and that a choice by the finder of fact between two permissive views resolving all factual conflicts in favor of one litigant, is not "clearly erroneous."

2. The decision of the Court of Appeals is probably in conflict with applicable decisions of other Courts of Appeals, particularly *Orvis* v. *Higgins* (C.A. 2), 180 F. 2d 537, holding that the proper interpretation of

Rule 52(a) is that Findings of Fact by a trial judge sitting without a jury may be disregarded on appeal and findings by the Court of Appeals substituted therefor *only* where the findings of the trial court are based on *written* evidence *alone*, where such evidence is partly oral and partly written and the written evidence is decisive of the facts, and that findings based entirely on oral testimony may be disturbed "only *in the most unusual circumstances*"; and *Colusa Remedy Co.* v. *U. S.* (C.A. 8), 176 F. 2d 554, holding that an Appeals Court will not overrule the findings of the trial court where it appeared that the question of effectiveness had not transcended the realm of opinion into the realm of demonstrable fact; and *United States* v. *Dr. David Roberts Vet. Co.* (C.A. 7), 104 F. 2d 785, holding that a man should not be convicted because he has not received the endorsement of the medical profession and that the Court of Appeals had no *power* to *weigh conflicting evidence* concerning effectiveness of drugs; and *United States* v. *Kaadt* (C.A. 7), 171 F. 2d 600, and *United States* v. *Six Dozen-Dr. Peter's Juriko* (C.A. 7), 158 F. 2d 667, to the same effect.

3. The decision of the Court of Appeals decides an important question of Federal law which has not been fully, but should be, settled by this Court, in that there is confusion among the decisions from the various Courts of Appeals as to the true meaning of Rule 52(a) of the Federal Rules of Civil Procedure, particularly as to the

precise limitations of the term "clearly erroneous" as applied to Findings of Fact, and as to the extent of the "due regard" which shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

4. The decision of the Court of Appeals decides a question of substance relating to the application of the Constitution of the United States by depriving many persons of their right to life and liberty and general welfare concerning a matter the powers to regulate which were not delegated to the United States but were reserved to the people themselves.

---

**Prayer for Writ**

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 13645, United States of America, Appellant, versus Hoxsey Cancer Clinic, a partnership, and Harry M. Hoxsey, an individual, appellees"; and that said judgment of the said Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the

premises as to this Honorable Court may seem meet and just.

HOXSEY CANCER CLINIC, and
HARRY M. HOXSEY,
*Petitioners,*
*By* HERBERT K. HYDE and
ROY ST. LEWIS,
*Attorneys for Petitioners.*

---

The undersigned attorneys for petitioners hereby certify that we believe there is merit in the foregoing Petition and that the same is filed in good faith and not for delay.

HERBERT K. HYDE
ROY ST. LEWIS
*Attorneys for Petitioners.*

# In The
# Supreme Court of the United States
**OCTOBER TERM, 1952**

---

**No.**

---

HOXSEY CANCER CLINIC, a partnership, and
HARRY M. HOXSEY, an individual,
*Petitioners,*

VERSUS

UNITED STATES OF AMERICA,
*Respondent.*

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

### I.

### Opinions

The opinion of the United States District Court for the Northern District of Texas (R. 1140) was rendered by William H. Atwell, United States District Judge, and is reported in 94 F. Supp. 464.

The opinion of the Court of Appeals for the Fifth Circuit (R. 1157) (Hutcheson, Chief Judge, and Rus-

sell, and Rives, Circuit Judges; written by Circuit Judge Russell) is reported in 198 F. 2d 273.

## II.

### Jurisdiction

Jurisdiction of this Court to grant certiorari is invoked under Title 28, Section 1254(1), U.S.C.A., 62 Stat. 928, and is shown in the Petition at Page 3.

## III.

### Statement of the Case

As shown in the Petition at Page 2, the United States of America seeks to enjoin shipment in interstate commerce by petitioners of certain medicines intended for use in the treatment and cure of cancer, alleging misbranding thereof under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301, *et seq.)*. The misbranding is alleged to be because of certain statements contained in a booklet describing petitioners' clinic at Dallas, Texas, and its work in the treatment and cure of cancer.

At the time of trial Dr. J. B. Durkee, D.O., was, and had been for the preceding five years (R. 802) the Medical Director in charge of the Hoxsey Cancer Clinic, and testified that he had diagnosed and treated between 5,000 and 6,000 cases of cancer (R. 906). The record shows that he personally examined every patient (R. 910) to whom the medicine was sent, except in instances where it had previously been sent to other physicians

in other States, *i.e.*, Dr. E. S. McCauley (R. 545) and Dr. L. E. Downs (R. 35, 45), both of whom had made special studies in residence at the Hoxsey clinic and who used the medicines in treating their own patients. This practice of sending medicines to other doctors had been discontinued prior to the trial, and since every patient is personally examined at the clinic in Dallas by physicians qualified under the laws of Texas by taking the same examinations as doctors of medicine, before any medicine is given or sent to them.

As stated by the trial court in its opinion (R. 1144) "after six days of the introduction of voluminous verbal testimony from both physician and patient, for both sides, and voluminous exhibits from both sides," the trial court made Findings of Fact as follows:

"FINDINGS OF FACT

1.

"The respondent did forward in interstate commerce to physicians in other States who had been present at the Hoxsey Clinic and studied its methods and efficacy for a considerable time, and were using such medicines and prescriptions, in their similar treatment.

2.

"That accompanying such shipments were booklets containing the statements and illustrations quoted in the pleadings of both complainant and respondents.

3.

"That the respondents' treatment *is not injurious. Some it cures, and some it does not cure, and some it*

*relieves somewhat. That respondents do not guarantee to cure.*

4.

*"That the statements contained in said labels so pleaded, are neither false nor misleading. That if in doubt as to the effectuality of the treatment, they take the patient on trial, and frequently, without charge to the patient.*

5.

*"That the percentage of efficient and beneficial treatment by respondents is reasonably comparable to the efficiency and success of surgery and radium, and without the physical suffering and dire consequences of radium, if improperly administered, and surgery, if not successful in completely removing the entire malignant portion.*

6.

"That cancer is an aggregation of outlaw cells with the propensity to migrate and grow in size and in the territory covered and the definite destruction of the body, or, a serious portion thereof.

7.

"That the respondents do have two basic medicines to which are added, if and when the examination of the patient calls for such additions, a large number of drugs and mitigations in a separate room at the clinic. That it also subtracts and changes the basic elements of the two medicines as indicated, in the judgment of the Medical Director of the clinic when indicated by the examination of the patient, but that no such prescription accompanies shipments made in interstate commerce to the doctors in other States who are using the Hoxsey method, nor does the same appear upon the bottles or receptacles of the medicine.

8.

"That the Food and Drug inspectors seized medicines and pamphlets and booklets such as are pleaded, from the doctors in other States who have been using the Hoxsey method, and which came interstate commerce. That such seizures were prior to the institution of this suit, since which time the respondents have made no interstate shipments of either pamphlets, or, medicines.

"CONCLUSIONS OF LAW

"It is not necessary that mislabeling, or misbrandings within the meaning of the Act shall actually be on the container, but they may accompany it, or, reach the user in some other manner. There is some authority to the contrary, but I think the case of *Kordel* v. *United States*, 335 U.S. 345, and the case of *United States* v. *Urbuitit*, 335 U.S. 355, are controlling.

"The exemptions provided for in the Act with reference to physicians' prescriptions, and the placing of the contents on the bottle, or, container, are not applicable, nor can they be of any use to the respondents here, because the respondents' method in forwarding articles and pamphlets to the physicians in other States who were using the method and treatments were not so displayed. Nor can the plea of good faith or, the charitable inclinations of the respondents save them from the rigors of the Act. Nor can the discontinuance of the practice of shipments to physicians in other States, save the respondents from the injunctive features of the Act, even though the Chancellor, speaking in equity, will not require that which is useless.

"*Nevertheless, the facts disclosed by the testimony and found as above, as well as the failure of the Government to successfully carry the burden and show by a preponderance of the testimony, the correctness of its charges,* merits, and must have, a refusal of the injunctive relief sought, and a dismissal

of the bill, and such order and decree is, accordingly, announced."

From the foregoing the Government appealed to the Court of Appeals for the Fifth Circuit, and in its Brief filed in that court urged, (I) That there was undisputed proof of specific charges of misbranding, (II) That it was prejudicial error for the trial court to permit laymen to testify that they had cancer, and (III) That the trial court's finding that the Hoxsey drugs are not falsely represented as cancer cures and that they do cure cancer are *clearly erroneous* and should be set aside.

The Court of Appeals reversed the trial court by reaching the conclusion (R. 1172) that the finding of the trial court that the representations were neither false nor misleading is "against the *great preponderance* of the *credible* testimony; that it does not reflect or represent the truth and right of the case" [citing *Sanders* v. *Leech* (C.A. 5), 158 F. 2d 486], and that on the entire evidence the Court of Appeals was "left with the definite and firm conviction that a mistake has been committed" [citing *United States* v. *Gypsum Co.*, 333 U.S. 364, 395].

In so doing, as will be demonstrated in the argument, the Court of Appeals did nothing except to *weigh* the evidence, pass upon the *credibility* of the witnesses, and assume the position of a trier of the facts.

---

## IV.

### Specifications of Error, and Summary of Argument

A. A correct interpretation of Rule 52(a) of the Federal Rules of Civil Procedure does not give to the Court of Appeals power to entirely disregard Findings of Fact of the trial court in an action tried upon the facts without a jury, and proceed to *weigh* the evidence and pass upon the *credibility* of the witnesses and set aside the trial court's judgment solely by resolving a conflict of medical opinion between two separate schools of thought as to the proper and best methods of treatment of patients for disease. Where it is necessary to *weigh* evidence (particularly oral evidence) and pass upon the *credibility* of witnesses, a Court of Appeals cannot say that the findings of the trial court are "clearly erroneous."

B. The granting of an injunction against petitioners would take away from him and from patients desiring to come to his clinic for treatment and medicine, their constitutional right to have a qualified doctor of their own choosing and to receive and take the medicines prescribed by such doctor.

---

## V.

### Argument

### A.

The pertinent part of Rule 52(a) of the Federal Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury * * *, the court shall find the facts specially

and state separately its conclusions of law thereon * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

The Findings of Fact and Conclusions of Law by the trial court in this case have been set forth in detail in Paragraph III of this Brief.

On appeal the Government advanced the contention that the Findings of Fact of the trial court were *clearly erroneous,* and the Court of Appeals approached the case on that question, and said (R. 1164):

"In approaching this question we are guided by some well recognized beliefs and experience so universally entertained and accepted by the practically unanimous *aggregation of medical science* as that contradiction thereof does not raise a substantial issue of fact. Thus, with practical unanimity, *those informed and in position to know* are of the firm belief that there is only one reliable and accurate means of determining whether what is thought to be cancer is, in truth and fact, actually cancer. * * * It is further true that despite the vast and continuous research which has been conducted into the cause of, and possible cure for, cancer the aggregate of medical experience and *qualified experts* recognize in the treatment of internal cancer *only* the methods of surgery, X-ray, radium and some of the radioactive by-products of atomic bomb production. This is so even though the ghastly truth is that these methods frequently fail and are, in many cases, themselves unsatisfactory. But it is true, nevertheless, that with present enlightenment they are our sole defenses against the scourge of cancer."

The "qualified experts" who testified and upon whose opinion the Court of Appeals bases its conclusion

as to the beliefs and experience of the "aggregation of medical science" by "those informed and in position to know," consisted of Dr. David I. Macht, a specialist in pharmacological and experimental therapeutics (R. 85), who himself stated that he *did not treat cancer* patients because "I know my limitations" (R. 97), and had never seen a single patient that was taking the Hoxsey drugs (R. 98); Dr. Max Goldzieher, a pathologist, who stated he had *never cured a cancer* (R. 115), and was not a cancer man (R. 117); Dr. George Burroughs Mider, a pathologist who testified concerning an experiment with *mice* using petitioners' medicines, but who had himself *treated* only a relatively few cases of cancer (R. 148), and Dr. William S. Murray, who conducted the experiment and whose entire career had been in "experimental cancer" (R. 123) and who stated that he was *not an expert* in the *treatment* of cancer, but only in its behavior (R. 134). (In our Brief and Petition for Rehearing we pointed out some serious errors in the calculations in this experiment, but that is of no consequence here). Also, Dr. R. L. Clark, a professor in the University of Texas and director of a hospital in Houston for cancer *research*, whose opinion was that the only certain way to definitely diagnose a cancer was by biopsy, that the appropriate methods for treating internal cancer are surgery, or radiation therapy, and who knew of no medicine taken orally that would cure cancer. Opposed to this *expert* testimony by "those informed and in posi-

tion to know," Dr. J. B. Durkee, Medical Director of the Hoxsey Cancer Clinic for the past five years (R. 902), testified that he had diagnosed and treated between 5,000 and 6,000 cases of cancer (R. 906), that he *can* determine cancer, and considers himself a specialist, and that he personally examines every patient (R. 910); described fully the method of examination, diagnosis and treatment (R. 918, *et seq.)*, the laboratory facilities and technicians (R. 926). Dr. Durkee was supported by the testimony of Dr. E. S. Macauley (R. 545, 549) and the Government witness Dr. E. L. Downs (R. 45, 47, 50), both of whom testified they had successfully treated persons afflicted with cancer by use of the Hoxsey medicines.

With this conflict of medical opinion the Court of Appeals, after making the above quoted statement, states (R. 1165):

> "We think this statement evidences no *acceptation of any particular school or segment* of *qualified* expert medical opinion and belief * * *. A court should not be so blind and deaf as to fail to see, hear and understand the import and effect of such matters of general public knowledge and acceptance, especially where they are established by the *overwhelming weight* of disinterested testimony as appears in the record now before us."

In *weighing* this evidence the Court of Appeals comments in its opinion that Dr. Macht had "impressive qualifications" (R. 1166), that Dr. Goldzieher was likewise "qualified and experienced in his specialty," that "the physicians and scientists participating in the *test*

possessed *superior* qualifications, and that Dr. Clark also was "an expert of *superior* qualification and experience" (R. 1167). The Court of Appeals then outlines the general pattern of the Government testimony concerning patients who had been treated by the Hoxsey method, and concludes that "If such testimony be accepted as *credible*, it clearly establishes the Government's contention" (R. 1168). The Court of Appeals then outlines briefly the evidence of the petitioners, stating (R. 1170) that such summaries are made,

> "* * * to show the general nature of the case put forward by the plaintiff and the defendant and to point up the *difference in the type of proof*,"

from which it concludes (R. 1171) that,

> "* * * the overwhelming *preponderance* of *qualified* opinion recognizes,"

that,

> "* * * the testimony of the three *osteopaths*—(one) of whom is a definitely *interested* witness who testified as to ability to diagnose contrary to *all accepted scientific* knowledge."

is not sufficient to "substantially dispute" the Government's case and was,

> "* * * wholly insufficient to cast such doubt as to authorize the trial court to find that the Government had failed to carry the burden of establishing the truth of the allegations of its complaint."

The Court of Appeals therefore concluded that the *evidence* (R. 1172),

> "* * * *considered* as a whole, should, and must, induce a conviction that the *finding* of the trial court

> that the representations were neither false nor misleading is so 'against the *great preponderance* of the credible testimony that it does not reflect or represent the truth and right of the case,' "

citing *Sanders* v. *Leech* (C.A. 5), 158 F. 2d 486; and that,

> "*On the entire evidence* we are 'left with the definite and firm conviction that a mistake has been committed,' "

citing *United States* v. *Gypsum Co.*, 333 U.S. 364, 395.

It is submitted that these two cases do not uphold the Court of Appeals in thus disregarding the findings of the trial court, and, without giving "due regard to the opportunity of the trial court to judge of the *credibility of* the witnesses," *weighing* the evidence, *resolving a conflict* of medical opinion between two schools of thought—osteopaths versus medical doctors (both of whom take the same examinations in Texas)—passing upon the *credibility* of the witnesses, and thus concluding that the findings of the trial court are "clearly erroneous" within the meaning of Rule 52(a) above quoted.

The statement by this Court in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 92 L. ed. 746, 68 S. Ct. 525, above quoted in the opinion of the Court of Appeals herein, was based peculiarly upon the factual situation existing in that case, where there was oral testimony as to the purpose of doing certain things, elicited by leading questions, and such testimony *directly conflicted with documentary evidence*, for which reason this

Court held that it could give the conflicting oral evidence "very little weight," "despite the opportunity of the trial court to appraise the credibility of the witnesses." Such is not the case here. The conflict here is not between documentary evidence and oral testimony, but between witnesses holding to two separate schools of thought and belief as to the proper and best methods of treatment of patients for disease.

A much more instructive announcement of the application of Rule 52(a) adaptable to this case is made in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, 94 L. ed. 105:

> "The objectivity of the trier of fact cannot be questioned merely because he resolves all factual conflicts arising in a legal proceeding in favor of one litigant."

and,

> "* * * a choice by the trier of facts between two *permissible views of the weight of evidence* is not 'clearly erroneous.' "

and in that case this Court quoted from *National Labor Relations Board* v. *Pittsburg S. S. Co.*, 337 U.S. 656, 69 S. Ct. 1283, 93 L. ed. 1602, as follows:

> "If defendants' witnesses spoke the truth, the findings are admittedly justified. * * * It ought to be unnecessary to say that Rule 52 applies to *appeals by the Government* as well as to those by other litigants. There is no exception * * *. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' "

The statement quoted by the Court of Appeals in its opinion in this case from an opinion by the same court in *Sanders* v. *Leech, supra,* is but a quotation of a *generalization.* Of course no court should reverse any case unless it is "left with a definite and firm conviction that a mistake has been committed." The fallacy of making that quotation as authority for what the Court of Appeals has done in this case is shown by looking at the facts in that case. The same court there refused to do just what it did do here, reverse the findings of the trial court, saying:

> "It is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the findings.
>
> "He is asking us * * * to assume the role of the trial judge, a role we may not play."

A very great number of reported cases have established the rule that a "Trial court's findings of fact supported by substantial evidence are conclusive on appeal," and that "that view of the evidence must be taken which is most favorable to the prevailing party," and that it is the province of the Court of Appeals "to determine *not* whether *it* would itself have made the same findings, but merely whether they rest on any rational basis of evidence," and that such findings are not to be "lightly set aside," etc. A few such cases are:

*Soy Food Mills* v. *Pillsbury Mills* (C.A. 7), 161 F. 2d 22, stating:

"Trial court's findings in respect of *merits of a formula* is conclusive on appeal where there is evidence to support it."

*Federal Savings & Loan Ins. Corp.* v. *First Natl. Bank* (C.A. 8), 164 F. 2d 929:

"On appeal that view of the evidence must be taken which is most favorable to the prevailing party, and if, when so viewed, the findings are supported by substantial competent evidence, they should be sustained."

*Arnstein* v. *Porter* (C.A. 2), 154 F. 2d 464:

"Where the facts are in real dispute, it is the function of the Circuit Court of Appeals * * * to determine *not* whether (it) would itself have made them, but merely whether they rest on sufficient evidence in the record."

*Gipps Brewing Corp.* v. *Central Mfgrs. Mut. Ins. Co.* (C.A. 7), 147 F. 2d 6:

"A reviewing court is bound by trial court's findings of fact founded on any rational basis of evidence."

*Coleman* v. *U. S.* (C.A., D.C.), 176 F. 2d 469:

"Trial judge has primary duty to find facts—and his determination is not to be lightly set aside."

*Hidspeth* v. *Esso Standard Oil Co.* (C.A. 8), 170 F. 2d 418:

"Court of review * * * does not retry cases or substitute its judgment for that of trial court on fact issues."

*Fox River Paper Corp.* v. *U. S.* (C.A. 7), 165 F. 2d 639:

> "Court of Appeals will consider only the evidence that supports finding, and it will not weigh the evidence or resolve any conflicts therein, or consider credibility of witnesses."

But it is useless to state these rules in generalities unless the Appellate Court follows them in application to the factual situation. This the Court of Appeals did not do in this case. It did not take that view of the evidence most favorable to the prevailing party. It did weigh the evidence, and did pass on the credibility of the witnesses. It did determine what it would have decided had it been the trier of the facts. And it did resolve a conflict of medical opinion in a way contrary to the trial court.

This is contrary to what the Court of Appeals refused to do *against* the Government in a similar case in *Colusa Remedy Co.* v. *U. S.* (C.A. 8), 176 F. 2d 554, wherein it appeared that the question of effectiveness of a remedy had not transcended the realm of opinion into the realm of demonstrable fact, and the court quoted from *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 23 S. Ct. 33, 47 L. ed. 90, in which this Court said:

> "It is a *question of opinion*, in all the cases, and although *we* may think the opinion may be *better* founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all, it is, in each case, opinion only, and not existing facts with which these cases deal."

The opinion in this case is in conflict with that in *United States* v. *Dr. David Roberts Vet. Co.* (C.A. 7), 104 F. 2d 785, in which it is said:

> "The point is made that a man should not be convicted *because he has not received the endorsement of the medical profession* and *United States* v. *American Laboratories*, 222 F. 104, is cited. * * * As defendant's testimony made for conflicting evidence, a question of weighing the evidence was presented. To weigh the evidence is not within the power of this court."

and is in conflict with *United States* v. *Kaadt* (C.A. 7), 171 F. 2d 600:

> "We have already held that a *consensus of medical opinion* is a question of fact and proveable as such, * * * and it has been held that a *conflict of medical opinion concerning the effectiveness of a drug* also presents a question of fact. *7 Cases* v. *U. S.*, 239 U.S. 510, 36 S. Ct. 190, 60 L. ed. 411, L.R.A. 1916 D. 164."

and is also in conflict with *United States* v. *Six Dozen-Dr. Peter's Juriko* (C.A. 7), 158 F. 2d 667, wherein a great deal of medical testimony was offered by both sides, as to which it was said that,

> "* * * no useful purpose could be served in an attempt to analyze or dissect this expert testimony as it pertains to the issues in controversy. In fact, to do so would involve a *weighing* of the testimony, which is not our function but was that of the jury."

But it may be said that even though this is an important case to these petitioners and to the patients who have been receiving his medicines in interstate commerce,

yet it is only one mistake by one court in one case and is not sufficiently important for this Court to take jurisdiction to correct that mistake. And yet the application of Rule 52(a) as was done by the Court of Appeals in this case involves a much more important matter, and that is:

When do Findings of Fact by a trial court become so "clearly erroneous" that the opportunity of the trial court to judge of the credibility of the witnesses may be disregarded? If the meaning of Rule 52 (a) is not "clear," as it apparently is not, it should be made clear by this Court.

The best summation which we have been able to find as to the true meaning of the rule in its application to factual situations is that in *Orvis* v. *Higgins* (C.A. 2), 180 F. 2d 537. The court reviews the *Gypsum case, supra*, and points out that the *oral* testimony in that case was in conflict with the *documentary* proof, and reconciles the *Gypsum case* with the *Yellow Cab Co. case, supra*, because in the latter case the oral testimony was not incompatible with inferences which could be reasonably drawn from the documentary evidence, and in the light of these cases makes the following gradations under Rule 52(a):

> "Where the trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on *written* evidence *alone*, we are as able as he to determine *credibility*, and so we may disregard his findings. (b) Where the evi-

dence is *partly oral* and the balance is *written* or deals with *undisputed* facts, then we may ignore the trial judge's finding and substitute our own. (1) if the written evidence or some undisputed fact renders the credibility of the oral evidence extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that, *evaluation of credibility has no significance.* (c) But where the evidence supporting his findings as to any fact issue is *entirely oral* testimony, we may disturb that finding *only in the most unusual circumstances.*"

Even this gradation, however, leaves much to be desired. For, we may ask, what are "most unusual circumstances?" which would make such findings "clearly erroneous?"

Bouvier, citing Webster, defines "clear" as being "Free from indistinctness or uncertainty; easily understood; perspicuous, plain; free from impediment, embarrassment or accusation." And "clearly" according to Webster's definition of it, means "in a clear manner; without obscurity; without obstruction; without entanglement or confusion; without uncertainty."

Judge Chase, in a dissenting opinion in *Orvis* v. *Higgins, supra,* remarked that "Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient." In this connection it might be pointed out that this case was argued before the Court of Appeals on November 26, 1951 (R. 1157) and after practically every other case submitted at that term had long since been decided, and while the court was in sum-

mer vacation, the opinion in this case was rendered on July 31, 1952 (R. 1157), and a report thereof was published in the *Dallas Morning News* at a time when petitioners were engaged in the trial of a libel suit against Morris Fishbein, former Editor of the Journal of the American Medical Association, on account of publications written by him and published in that Journal in which petitioner Hoxsey was referred to as a "Cancer charlatan" and other similar charges were made as to the effectiveness of petitioners' remedy, in which trial many of the same witnesses, including some of the Government *expert* witnesses, testified, and in which the issues were very substantially the same, *i.e.*, the efficacy of Hoxsey's treatment, and at the conclusion of that trial in the District Court of the 44th Judicial District of Dallas County, Texas (Case No. 31011-B), *a jury of twelve men unanimously* branded all the charges so made against Hoxsey as *false*, in effect following Judge Atwell's findings in this case.

There must be some tribunal in which fact-finding power is lodged. Our conception of where that should be is, in the jury where there is a jury, and in the trial judge where he sits without a jury. This we think to be the meaning of Rule 52(a). Most of the courts follow that rule. But as long as there remains any obscurity in the true meaning of this expression "clearly erroneous" some Courts of Appeals will in isolated instances continue to take it upon themselves to pass upon

the weight of the evidence and the credibility of the witnesses as the Court of Appeals has "clearly" done in this instance. And we use the word "clearly" here advisedly, because there is no obscurity but that the Court of Appeals has done that very thing here; no uncertainty about it—because it uses the word "weight" when referring to the evidence and the word "credible" when referring to the witnesses, many times in the opinion.

---

B.

One of the purposes stated by the framers of the Constitution of the United States was to "promote the general Welfare" (Preamble, Constitution), and Congress was given the power to provide for the general welfare, and to regulate commerce among the several States (Constitution, Art. 1, Sec. 8); but by the 5th Amendment it was provided that no person should be deprived of life, liberty, or property, without due process of law, and by the 10th Amendment all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, were reserved to the States respectively, *or to the people*.

Let it be understood that we are not attacking the constitutionality of the Federal Food, Drug and Cosmetic Act, the ultimate goal of which was declared in *McDermott* v. *Wisconsin*, 228 U.S. 115, 33 S. Ct. 431, 57 L. ed. 754, to be consumer protection.

But the application of that Act to petitioners in the manner here proposed does deny to many persons their inalienable right to investigate and choose a doctor duly qualified and licensed as such, according to their own individual belief, and to take the medicines prescribed by that doctor in an effort to cure or alleviate whatever disease they believe they are afflicted with; and it does deny to petitioners' doctors, duly qualified and licensed by the State as such, of their right to prescribe what medicines they believe proper for the relief or cure of their patients.

---

## CONCLUSION

It is respectfully submitted that this Honorable Court should exercise its discretion and under its supervisory powers assume jurisdiction of this case, to the end that the true meaning of the power of Courts of Appeals under Rule 52(a) may be properly and authoritatively defined, and upon hearing that the judgment of the Court of Appeals for the Fifth Circuit shall be reversed; and that to such an end that a writ of certiorari should be granted and this Court should review the decision of said Court of Appeals and finally reverse it.

Respectfully submitted,

HERBERT K. HYDE,
706 Cravens Building,
Oklahoma City, Oklahoma;

ROY ST. LEWIS,
National Press Building,
Washington, D. C.,
*Attorneys for Petitioners.*

LEE WILLIAMS,
706 Cravens Building,
Oklahoma City, Oklahoma,
*On the Brief.*

DECEMBER, 1952.